IN THE HIGH COURT OF BOMBAY AT GOA.

SECOND APPEAL NO. 135/2004

Shri Rosario Felicio D'Souza,
(since deceased) by his legal heirs :

1. Smt. Matilda D'Souza
   of full age, residing at House No.200,
   Bhutier, Bardez, Goa.

2. Shri Napolean D'Souza,

3. Smt. Santan D'Souza,
   both of full age, and residing at
   Flat No.T-1, Opp. Zuarkar's Bungalow
   Shankarwadi, Taleigao, Goa;

4. Shri Peter D'Souza,

5. Smt. Laura D'Souza,
   both of full age, and residing at
   House No.200, Nerul, Bhatier,
   Bardez, Goa;

6. Shri Olimpio D'Souza,
   of full age, and residing at
   House No.18,
   Dr. Dada Vaidya Road, Panaji, Goa.

7. Shri Michael D'Souza,

8. Smt. Ovita D'Souza,
   both of full age, and residing at
   Hotel Avanti, Panaji, Goa.

9. Smt. Filomena D'Souza e Mascarenhas,

10. Shri Mathias Mascarenhas,

both of full age, and residing at
Hotel Golden Eye,
Calangute, Bardez, Goa. ..... Appellants.

V/s.

Shri Joao do Rosario Aleixo Gomes
alias Salvador Fortunato Gomes,
(since deceased) by his legal
representatives :

1. Smt. Maria Carmina De
Vitoria Gomes,

2. Shri Anthony Sequeira,
both of full age, and residing at
House No.17, Dr. Dada Vaidya Road,
Panaji, Goa. ..... Respondents.

Mr. S. S. Kantak, Advocate for the appellants.

Mr. J. Godinho, Advocate for the respondents.

CORAM : R.M. LODHA, J.

DATE : 24TH AUGUST, 2005.

ORAL ORDER :

Heard Mr. S.S. Kantak, learned Counsel for the appellants and Mr. J. Godinho, learned Counsel for the respondents.

2. The appellants claim to be the legal representatives of the

original appellant in the first appeal, namely Rosario Felicio D'Souza who died on 13.4.1998. No steps were taken for his substitution in the appeal by the present appellants who claim to be his legal representatives. Though the original appellant had already died during the pendency of the regular civil appeal before the first appeal Court and that the appeal had already abated for want of his legal representatives having been brought on record, but it appears that the appeal Court proceeded with the hearing of the appeal and dismissed the appeal on merits. Since it was the duty of the Advocate for the appellant to inform the Court that the appellant had died and that was not done, the appeal Court obviously had to proceed with the appeal on merits. However, in view of the legal position, the appeal could not have been heard on merits since the appellant was dead and his legal representatives having been not brought on record, as a matter of law the appeal had abated.

3. The learned Counsel for the appellants submits that since the appeal was decided on merits, the present appellants who are the legal representatives of the deceased appellant before the first appellate Court, the application for setting aside the

abatement of this appeal cannot be made by the present appellants before the first appellate Court.

4. Order 22, Rule 9, rub-rule (2) of the Code of Civil Procedure provides thus :

> "**9. Effect of abatement or dismissal -**
>
> (1) ...
>
> (2) The plaintiff or the person claiming to be the legal representative of a deceased plaintiff or the assignee or the receiver in the case of an insolvent plaintiff may apply for an order to set aside the abatement or dismissal; and if it is proved that he was prevented by any sufficient cause from continuing the suit, the Court shall set aside the abatement or dismissal upon such terms as to costs or otherwise as it thinks fit. "

5. Order 22, Rule 11 provides that for the purposes of Order 22 the word `plaintiff' shall be held to include an appellant, the word "defendant" a respondent, and the word "suit" an appeal. Thus, the appellants in this second appeal who claim to be the legal representatives of the deceased appellant in first appeal can apply for setting aside the abatement of the appeal. However, the difficulty in this appeal has arisen because despite

the fact that first appeal had abated, the appeal Court proceeded with the hearing of the appeal on merits and decided the same accordingly. In my view, the interest of justice would be subserved if it is made clear that it is open to the appellants to make an application for setting aside abatement of the appeal being Regular Civil Appeal No. 44/96 before the first appeal Court and if such an application is made, the first appellate Court shall hear and decide such application on merits uninfluenced by the fact that the said appeal was decided on merits by the appeal Court. As already indicated above, the decision in the appeal on merits by the appeal Court is legally not sustainable since the appeal had already abated. It is settled legal position that no specific order of abatement is necessary and abatement takes place as a matter of law if the legal representatives of the deceased party are not brought on record within the statutory period.

6. With the aforesaid observations, the second appeal is disposed of.

R.M. LODHA, J.

ssm.